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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 590

HENRY R. AHLERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7–8) is reported at 336 F. 2d 191.

JURISDICTION

The judgments of the court of appeals were entered on September 1, 1964. The petition for a writ of certiorari was filed on October 14, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 601(b) of the Labor-Management Reporting and Disclosure Act of 1959 incorporates the provision of the Federal Trade Commis-

sion Act that confers immunity from prosecution for witnesses.

2. Whether the Secretary of Labor could subpoena petitioner to testify about possible violations of the Labor-Management Reporting and Disclosure Act after petitioner had refused to testify before a grand jury.

3. Whether petitioner's conviction for civil contempt complied with the requirements of procedural due process of law.

STATUTE INVOLVED

The Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. (Supp. V) 401–531, provides in pertinent part:

Section 601, 73 Stat. 539, 29 U.S.C. (Supp. V) 521:

> (a) The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this Act (except title I or amendments made by this Act to other statutes) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report required by this Act and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation.

(b) For the purpose of any investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (15 U.S.C. 49, 50), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary or any officers designated by him.

Section 607, 73 Stat. 540, 29 U.S.C. (Supp. V) 527:

In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this Act and the functions of any such agency as he may find to be practicable and consistent with law. The Secretary may utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary and, to the extent permitted by law, to provide such information and facilities as he may request for his assistance in the performance of his functions under this Act. The Attorney General or his representative shall receive from the Secretary for appropriate action such evidence developed in the performance of his functions under this

Act as may be found to warrant consideration for criminal prosecution under the provisions of this Act or other Federal law.

The Federal Trade Commission Act, as amended, 38 Stat. 717, 15 U.S.C. 41–77, provides in pertinent part:

Section 9, 38 Stat. 722, 15 U.S.C. 49:

That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any

corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are

taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

STATEMENT

The United States District Court for the Southern District of New York adjudged petitioner in civil contempt for disobeying a court order to testify during a Labor Department investigation and has sentenced petitioner to be confined until he purges himself of the contempt by testifying (II. R. 10–13). The court of appeals affirmed the judgment (Pet. App. 7–8; 336 F. 2d 191). Petitioner's application for a stay was denied by Mr. Justice Harlan on October 16, 1964, and his further application to the whole Court was denied on October 26.

The pertinent facts may be summarized as follows:

During 1963 and 1964 a grand jury has been investigating the activities of Local 32–E of the Building Service Employees International Union.[1] In February 1964 the jurors returned an indictment charging three officers of Local 32–E with accepting payments for moderating their union's demands in collective-bargaining negotiations. Later, in March and April 1964, petitioner, a building contractor, made four or five appearances before the same grand jury and, each time, refused to testify on the ground of self-incrimination (I. R. 31–32; II. R. 48–49).[2]

The next month, May, petitioner appeared on three separate occasions, in response to a subpoena issued by the Officer of Labor-Management and Welfare-Pension Reports, Department of Labor, at hearings conducted by that office under its authority to investigate possible violations of the Labor-Management Reporting and Disclosure Act of 1959.[3] At the first hearing on May 8, presided over by a Labor Department compliance officer, petitioner refused to answer questions because of insufficient time to consult with an attorney. After directing petitioner to answer and reading to him the statutory provisions that conferred immunity from prosecution for testimony given at

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[1] The record shows (II. R. 49), and the United States Attorney advises us, that the investigation still continues.

[2] The record is silent on the dates of petitioner's appearances, but we are advised by the United States Attorney that they occured in March and April.

[3] 73 Stat. 519, 29 U.S.C. (Supp. V) 401–531. For the authority to investigate, see Section 601(a) of the Act, p. 2, *supra*.

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the hearing,[4] the compliance officer continued the hearing until May 11 so that petitioner could retain counsel (I. R. 7–10). On that day petitioner appeared again without counsel and invoked the privilege against self-incrimination in answer to all questions, including inquiries about whether he had consulted with or wished further time to consult with an attorney (I. R. 11–13). At a third hearing on May 14, petitioner again appeared without counsel and again invoked the self-incrimination privilege against all questions (I. R. 14–18). During the hearing, the compliance officer explained that immunity from prosecution had been conferred and that petitioner's refusal to testify could lead to prosecution for contempt (I. R. 15–16).

After the last hearing, the Labor Department referred the matter to the United States Attorney for appropriate action (I. R. 5). On motion of the government, Judge Cashin signed an order that petitioner show cause why he should not be directed to testify and be punished for contempt. Although petitioner learned about the show cause order in telephone conversations with the marshal and the Assistant United States Attorney, all attempts to serve it on him were unsuccessful. In one telephone conver-

[4] The compliance officer read the immunity provision of Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U.S.C. 49. The applicability of that provision to petitioner's testimony at the hearing, through incorporation under Section 601(b) of the Labor-Management Reporting and Disclosure Act, 73 Stat. 539, 29 U.S.C. (Supp. V) 521(b), is an issue raised in the instant petition (Pet. 7–17).

sation, petitioner said that he was not "going to make the Marshal's job any easier" (I. R. 5–6).

On June 17 the government obtained a second show cause order, this time from Judge Cooper, identical with the first except for an additional provision that service at petitioner's place of business would be deemed sufficient (I. R. 2–3). Six days later petitioner appeared with counsel at a hearing on the show cause order before Judge Tyler. On July 9, after considering petitioner's contention that he could not be compelled to testify, Judge Tyler ordered petitioner to appear and answer the questions at the Labor Department hearing on July 16. The order provided that if petitioner disobeyed, the United States Attorney could move *ex parte* for a writ of attachment, under which the marshal could arrest petitioner and bring him forthwith before the court (I. R. 19–22, 27–40).

Petitioner immediately filed a notice of appeal from Judge Tyler's order and moved the court of appeals to stay the order pending argument of the appeal on the merits. On July 15, a three-judge panel of the court of appeals refused to stay the order (I. R. 23–24; II. R. 98).

The next morning, July 16, petitioner appeared with three attorneys before the compliance officer and, after giving his name, claimed the self-incrimination privilege to all inquiries (II. R. 14–31). That afternoon, on *ex parte* motion of the government (as provided in the order of July 9 directing petitioner to testify), Judge Tyler signed an order issuing a writ

of attachment and holding petitioner in contempt (II. R. 3–4). Later that same day, petitioner's attorneys assured the Assistant United States Attorney that an arrest would be unnecessary because petitioner would appear in court the next afternoon. But petitioner did not appear. Instead, he telephoned his attorneys that he had left the city and would not return until Monday morning, July 20. His attorneys advised him to surrender when he returned (II. R. 35, 55, 65, 79–80).

Finally, on July 20 petitioner and his attorneys appeared before Judge Palmieri. At the very beginning of the hearing, the Assistant United States Attorney announced that if petitioner were now prepared to answer the Labor Department's inquiries, the government would abandon the contempt proceedings (II. R. 35). On hearing this, the court asked petitioner's counsel to reply to the government's offer. Counsel answered, "Well, Judge, it is not as easy as all that." and went on to request a statement of the charges and a "hearing on reasonable notice" (II. R. 35–36). The court answered counsel (II. R. 36):

> Your request is denied. I again ask you, is your client prepared to answer relevant questions by the compliance officer of the Labor Department? That is the only question I want you to answer.

To which counsel replied, "I will answer that by saying to you that my client has advised us that he wants to stand on his constitutional right" (II. R. 36).

After ascertaining what constitutional right petitioner was asserting—counsel handed up to the court

the arguments made in the court of appeals on a motion for a stay—Judge Palmieri said, "As I understand this matter there is nothing left for me to do except to see that a proper order of contempt is prepared" (II. R. 36–37). A few moments later, the judge added (II. R. 37–38):

> There has been a long laborious procedure on the part of the government to give notice, to give him a chance to appear with counsel, to explain every step to him; he has been before the compliance examiner several times. He is now being given another opportunity today after you failed to get a stay from the Court of Appeals to answer the questions, and he still doesn't want to answer the question.

During the hearing, the court made it clear that petitioner's contempt would be civil—not criminal—and that he would have "the right to unlock the key to the jail door" by complying (II. R. 38). Later, when petitioner contended that the compliance officer had never conferred immunity on him, the court said (II. R. 43):

> If he is disposed to testify, I will immediately convoke the Court and direct the examiner to appear and make a formal offer in my presence in order to eliminate any possible question about whether he made a proper offer.
>
> I believe he did, but in order to relieve you of any burden in that respect, I will have him appear and make the offer.

Petitioner, however, refused the offer, insisting that it would not rectify the situation (II. R. 43).

After the hearing, Judge Palmieri signed an order adjudging petitioner in contempt and directing his

imprisonment until he complies with the order to testify at the Labor Department proceeding (II. R. 10–13).

ARGUMENT

1. Contrary to petitioner's principal contention (Pet. 7–17), legislative history and statutory language show conclusively that Section 601(b) of the Labor-Management Reporting and Disclosure Act[5] incorporates the immunity provision of Section 9 of the Federal Trade Commission Act.[6]

a. The Labor-Management Reporting and Disclosure Act derives from a bill that Senator Kennedy introduced in 1958 (S. 3974, 85th Cong., 2d Sess.). Through an oversight (104 Cong. Rec. 10949), that bill, as originally introduced, did not confer investigative and subpoena powers on the Secretary of Labor. On the floor of the Senate, Senator Cooper introduced an amendment that would, in his words, "give the Secretary of Labor the full subpena powers that are granted the Federal Trade Commission, and which is [sic] also granted to the Administrator of the Wage and Hour Division, under the Fair Labor Standards Act" (104 Cong. Rec. 10948). The amendment was in the exact language of Section 601(b) as finally enacted.[7] After reading the amendment, Senator Cooper said (*ibid.*):

> So that there may be no doubt as to what the full powers of the Secretary would be under the

[5] 73 Stat. 539, 29 U.S.C. (Supp. V) 521(b). See p. 3, *supra*.

[6] 38 Stat. 722, 15 U.S.C. 49, see pp. 4–6, *supra*.

[7] The amendment was virtually identical with Section 9 of the Fair Labor Standards Act, 52 Stat. 1065, 29 U.S.C. 209, to which Senator Cooper referred in his remarks quoted above.

> amendment, I ask unanimous consent to have printed in the RECORD at this point section 49, title 15, United States Code Annotated.

He then had printed into the Record Section 9 of the Federal Trade Commission Act in its entirety—including the immunity provision. A quorum was called so that all the Senators could be present to discuss the amendment. Before the assembled body, Senator Kennedy endorsed the amendment, and it passed by a vote of 86-0 (104 Cong. Rec. 10948–10951).

That year the Kennedy bill passed the Senate but not the House of Representatives (104 Cong. Rec. 11486–11487, 18287–18288). The next year, 1959, Senator Kennedy's legislation (S. 505, 1555, 86th Cong., 1st Sess.) again passed the Senate and, as modified by Representatives Landrum and Griffin on the floor (H.R. 8400, 8401), it also passed the House of Representatives and was enacted into law (105 Cong. Rec. 6745, 15891–15892, 17919–17920, 18153–18154). The Cooper amendment remained unchanged in the Kennedy bills, the Landrum-Griffin bill, and as Section 601(b) in the final version of the Act (105 Cong. Rec. 893, 15709). During all the debates, no one questioned that the amendment incorporated the immunity provision of Section 9 of the Federal Trade Commission Act. In view of Senator Cooper's painstaking efforts to make explicit that his amendment incorporated all of Section 9, petitioner's contention to the contrary is entirely without merit.

b. The text of Section 601(b)—which reads in pertinent part, "the provisions of section 9 and 10 (re-

lating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act * * *"—itself refutes petitioner's contention. The argument founded on the parenthetical clause is not persuasive. Under settled principles of English usage,[8] a modifying clause enclosed within punctuation marks—commas, dashes, or, as here, parentheses—merely comments parenthetically or describes the subject that it modifies, without restricting or limiting the scope of the subject to the instances enumerated within its terms. Thus, it is immaterial whether the parenthetical clause of Section 601(b) is a wholly complete or accurate shorthand description of the provisions of the Federal Trade Commission Act that are otherwise explicitly incorporated. It does appear, however, that the description given, which is taken from the first paragraph of Section 9, applies to all the incidents of the subpoena power enumerated in the section, including witness fees and immunity from prosecution.

2. There is no merit to petitioner's contention (Pet. 18–20) that the Department of Justice improperly availed itself of the Secretary of Labor's subpoena powers. Section 607 of the Labor-Management Reporting and Disclosure Act[9] provides, in pertinent part:

> In order to avoid unnecessary expense and duplication of functions among Government

[8] See, *eg.*, Fowler, *The King's English* 83–100 (1958); Prentice-Hall, *Handbook for Writers* 140–144 (1963).

[9] 73 Stat. 540, 29 U.S.C. (Supp. V) 527. See pp. 3–4, *supra*.

> agencies, the Secretary may make such arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this Act and the functions of any such agency as he may find to be practicable and consistent with law. * * *

Under the circumstances, there can be no question that the Department of Labor acted properly in subpoenaing petitioner's testimony and in granting him immunity from prosecution. *Goldberg* v. *Battles,* 196 F. Supp. 749, 753 (E.D. Pa.), affirmed, 299 F. 2d 937 (C.A. 3), certiorari denied, 371 U.S. 817.

3. The contempt conviction was not procedurally defective (Pet. 21–23). Since petitioner has been adjudged in civil contempt, and the penalty is conditional, to secure compliance with the court's order, the procedures prescribed by the Criminal Rules for cases of criminal contempt are not applicable. *Alexander* v. *United States,* 173 F. 2d 865 (C.A. 9); see *United States* v. *United Mine Workers,* 330 U.S. 258, 295; *Brown* v. *United States,* 359 U.S. 41, 55 (dissenting opinion). Conditional punishment for disobedience of a court order can be imposed summarily. See *United States* v. *Barnett,* 376 U.S. 681, 727, n. 6 (dissenting opinion); *Brown* v. *United States,* 359 U.S. at 55 (dissenting opinion). The test is whether the procedure met the requirements of due process of law—namely, adequate notice, a reasonable opportunity to defend, and representation by counsel. *In re Green,* 369 U.S. 689 (contempt conviction in State Court). In this case, as the history detailed in the Statement makes plain, all the demands of procedural

fairness were fully satisfied. It is clear that petitioner was afforded ample opportunity to present his legal arguments before the final adjudication of contempt. See *In re Green,* 369 U.S. 689. Compare *United States* v. *United Mine Workers,* 330 U.S. 258, 289. He presented both oral argument and a brief to Judge Tyler, and, though not required to do so, Judge Palmieri did permit petitioner to present again his constitutional objections, offered to remedy petitioner's claim that immunity had never been actually conferred, and removed any ambiguity as to whether the contempt was civil or criminal. Finally, the court of appeals stayed Judge Palmieri's judgment until after it decided petitioner's appeal on the merits (II. R. 125, 127), so that petitioner received a further hearing on all his legal objections before he was committed to prison. Petitioner cannot complain of unfairness.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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